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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR ALEJANDRO ERAZO, Defendant and Appellant.	G045542 (Super. Ct. No. 10NF1209) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Reversed with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Victor Alejandro Erazo of committing forcible lewd acts on a child under age 14 (Pen. Code, § 288, subd. (b)(1)),[1] and a second count of nonforcible lewd acts on a child under age 14 (§ 288, subd. (a)). Erazo contends the trial court erred in denying his request to discharge retained counsel, his conduct constituted a single offense supporting only one conviction for forcible lewd acts, and the court erred in declining to stay punishment under section 654. The Attorney General concedes the trial court applied the wrong legal standard in denying Erazo's request to discharge retained counsel, and we agree the trial court erred. Accordingly, we reverse the judgment.

I

FACTUAL AND PROCEDURAL HISTORY

In April 2010, 11-year-old Emma lived with her maternal aunt L. and L.'s seven-year-old daughter in a two-bedroom apartment in Anaheim. At this time, L. had been dating Erazo for about four months.

Around 10:30 p.m. on the evening of April 3, Erazo and his twin six-year-old sons arrived at L.'s apartment with pizza, soda, and beer to watch television. Erazo drank three beers. Around 2:00 a.m., L., her daughter, Erazo, and his sons, went to sleep in L.'s bedroom. This was the first time Erazo had stayed the night. Emma slept on the living room couch.

Emma, wearing basketball shorts, underwear and a T-shirt, fell asleep watching television. She felt a hand on her face and heard someone go into the bathroom. She walked into the kitchen to get a drink as Erazo emerged from the bathroom. They passed each other, and he returned to the bedroom. A short time later,

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[1] All further statutory references are to the Penal Code.

Erazo approached Emma where she was lying on the couch, smiled, and took his underwear off. He began touching her vaginal area over her clothing. She resisted his attempt to remove her shorts. As he pulled on her shorts, his other hand was on his erect penis.

Erazo managed to remove Emma's shorts and underwear. He pinned her hands, got on top of her, and tried to "make his penis go inside of" her, but she resisted. Emma freed her hands, using one to cover her vagina and the other to push him away. She felt his penis on her right hand. He said, "It's okay. It's okay." She told him to stop, and screamed for her aunt. He began "shushing" her, but she managed to push him off and onto the floor.

Emma covered herself with the blanket and turned her back to him. He got up, placed his hands on her arm and back and tried to flip her onto to her back. She screamed her "aunt's name loud enough for him to get scared," and he retreated to the bedroom. Emma turned the television off and put her shorts back on. Erazo returned to the living room about five minutes later and found Emma crying. Erazo rubbed her back and said, "'Don't be ashamed,'" then returned to the bedroom.

L. did not notice Erazo leave the bedroom and did not hear any screams. The next day, Easter Sunday, Emma told L. that Erazo tried to "rape her." When L. confronted Erazo later in the day, he admitted the offense and acknowledged "it was something that shouldn't have happened." L. reported the matter to the police four days later. Emma's statement to a social worker with the Child Abuse Services Team (CAST) was generally consistent with her testimony.[2]

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[2] In her interview with the CAST social worker, Emma's recollection differed from her testimony in a few particulars. For example, she said she pushed defendant off the couch, pulled up her shorts, and covered herself with the blanket in that order. She told him to go away in a "medium" voice, and he complied. She turned off

During an interview with detectives on April 19, Erazo claimed Emma initiated the contact by hugging him and touching his "part." He pulled down her shorts and touched her on the top of her vagina. Emma said "she didn't want to" and he left. He came out a second time and saw her watching television, but he complied with her request to leave. He denied getting on top of her or using force.

Following a trial in May 2011, a jury convicted Erazo as noted above. In July 2011, the trial court imposed an eight-year prison sentence, comprised of the six-year midterm for the forcible lewd act conviction, and a two-year consecutive term (one-third the midterm) for the nonforcible lewd act conviction.[3]

II

DISCUSSION

A. *The Trial Court Erred When It Applied the Wrong Legal Standard to Deny Erazo's Request to Discharge His Retained Counsel*

The trial proceedings began May 11, 2011, with various preliminary matters. The next day, before a pretrial motion to suppress (*Miranda v. Arizona* (1966) 384 U.S. 436) and jury selection, Erazo informed the trial court he wanted to dismiss his retained lawyer, who had represented him since May 2010, and replace him with the public defender's office, which briefly had represented him earlier in the case.

The court cleared the courtroom and conducted a *Marsden* hearing. (*People v. Marsden* (1970) 2 Cal.3d 118, 123 (*Marsden*).) Erazo articulated his problems

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the television, and "stayed [on the couch] with [her] blanket all over me." Defendant then came back out of the bedroom and "kept trying to pull me back over and I told him to go away really loud." She did not mention crying. Defendant told her "don't be ashamed" when he was on top of her.

[3] Section 288 was amended effective after the crimes occurred in this case to increase the punishment for forcible lewd acts to five, eight, or 10 years.

with his retained counsel, and counsel informed the court of his efforts on Erazo's behalf. The court denied Erazo's request, explaining that retained counsel was providing adequate representation, and Erazo's disagreement with his attorney concerned tactics, an insufficient basis to remove counsel.

Erazo contends the trial court employed the wrong legal standard when it denied his request to relieve his attorney. The Attorney General concedes the issue, and we agree the trial court erred.

A criminal defendant's right to counsel and to present a defense are among our most cherished constitutional rights. (*People v. Ortiz* (1990) 51 Cal.3d 975, 982 (*Ortiz*); U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) These rights include the right to discharge hired counsel the defendant no longer wishes to retain. (*Ortiz,* at pp. 983, 985.) "The right to discharge retained counsel is based on '"necessity in view both of the delicate and confidential nature of the relation between [attorney and client], and of the evil engendered by friction or distrust."' [Citation.]" (*Id.* p. 983, original brackets.) In addition to "insuring reliability of the guilt-determining process," the right to chosen counsel serves as a bulwark of liberty in another respect, reinforcing "the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command." (*People v. Crovedi* (1966) 65 Cal.2d 199, 206 (*Crovedi*).) While counsel may discharge *appointed* counsel only if that lawyer is rendering inadequate representation or there exists an irreconcilable conflict between counsel and client (*Ortiz,* at p. 984; see *Marsden, supra,* 2 Cal.3d at p. 123), the defendant may discharge retained counsel with or without cause (*Ortiz,* at p. 983).

This right is not absolute, however. The trial court may reject a motion to relieve retained counsel "if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*Ortiz, supra,* 51 Cal.3d at p. 983.) The court "must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.'" (*Id.* at p. 984.) Thus, the court "must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*People v. Lara* (2001) 86 Cal.App.4th 139, 153 (*Lara*).) The "prospect of possibly impairing efficient judicial administration" must be sufficiently weighty "to overcome defendant's interest in obtaining counsel of his [or her] choice" (*People v. Gzikowski* (1982) 32 Cal.3d 580, 589); indeed, the disruption must be "unreasonable under the circumstances of the particular case" (*Crovedi, supra,* 65 Cal.2d at p. 208).

There is "no mechanical test" to determine whether denial of a request to replace an attorney violates the defendant's rights; "rather each case must be decided on its own facts." (*People v. Blake* (1980) 105 Cal.App.3d 619, 624; *Ortiz, supra,* 51 Cal.3d at p. 983.) The defendant bears the burden of demonstrating an abuse of discretion. (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) Nevertheless, "'discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.'" (*Lara, supra,* 86 Cal.App.4th at p. 165.)

Here, the trial court erred by following the procedures utilized under *Marsden*, which focus on the quality of counsel's representation rather than the potential disruption occasioned by discharge of retained counsel. As noted, the parties agree the trial court erred, but differ on the remedy. Erazo contends the judgment must be unconditionally reversed, while the Attorney General asserts the "proper remedy in this

case is to reverse and remand for the trial court to reconsider the request under the proper standard [under *Ortiz*] and then proceed accordingly." We agree with the Attorney General.

In *Ortiz*, the Supreme Court held that the defendant was entitled to an automatic reversal of the judgment, explaining that "we must presume prejudice when an indigent criminal defendant is forced to proceed with a retained attorney whom he consistently, and *in a timely manner*, sought to discharge in favor of the public defender or other court-appointed counsel." (*Ortiz*, *supra*, 51 Cal.3d at p. 988, italics added.) Because the defendant in *Ortiz* lodged a timely request after his mistrial and well before his retrial, the court was not confronted with the issue of a limited remand.

People v. Minor (1980) 104 Cal.App.3d 194 is instructive. There, the trial court violated *Marsden* by summarily rejecting the defendant's request for substitute appointed counsel without providing him an opportunity to state his reasons. The appellate court held a limited remand procedure was appropriate, explaining that "[i]n its disposition of a criminal case the appellate court is not limited to the more common options of affirmance, reversal or modification of the judgment or order appealed from. The court 'may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances' [citation]. Where the record on appeal discloses trial error affecting the fairness and reliability of the guilt determination process, the normal remedy is outright reversal; in that instance it would usually not be considered 'just under the circumstances' to direct the trial court to take further proceedings aimed narrowly at the specific error. *But when the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several*

instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made." (*Id*. at p. 199, italics added; see also *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1401.)

Here, Erazo does not claim his trial attorney provided inadequate representation at Erazo's trial, and he has not shown other prejudicial errors occurred. Erazo contends, however, that *Ortiz* error is "trial error[]" that affects the reliability of his conviction.[4] We disagree. True, a defendant forced to trial with a retained attorney he timely sought to discharge need not show prejudice on appeal to obtain a reversal. As *Ortiz* explained, a defendant represented by retained counsel "furthers" the due process goal of "ensuring the reliability of the guilt-determining process . . . ." (*Ortiz, supra,* 51 Cal.3d at p. 988.) It does not follow, however, that the guilt determination is unreliable when the defendant is represented by an attorney the defendant did not want. This often occurs when appointed counsel represents an indigent defendant. (See *id.* at p. 986 [indigent defendants have no right to choose which attorney will be appointed to represent them].) The logical extension of Erazo's argument would mean any trial conducted by an attorney a defendant did not want would result in an automatic reversal, even where the trial court denied a defendant's untimely request to discharge retained counsel. *Ortiz* expressly held, however, a trial court may deny an untimely request to

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[4] We assume Erazo's argument is based on structural error, not trial error. A trial error is one "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless . . . ." (*Arizona v. Fulminante* (1991) 499 U.S 279, 307-308.) Structural errors, in contrast, are not subject to harmless-error analysis because they affect the "framework within which the trial proceeds," and are not "simply an error in the trial process itself." (*Id.* at pp. 309-310.) The "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."'" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.)

discharge counsel, and an ensuing conviction will stand if the defendant fails to demonstrate prejudice on appeal.

Thus, the only infirmity in the judgment is the *Marsden* procedure the court utilized in requiring Erazo to demonstrate his retained lawyer was incompetent. We see no reason why the trial court cannot revisit the issue to determine whether Erazo lodged a timely request under the standards articulated in *Ortiz* and its progeny.[5] For the reasons discussed above, we remand the matter to the trial court with directions to consider Erazo's request to discharge retained counsel under the correct legal standard as articulated in *Ortiz*.

B. *The Evidence Supported Two Convictions for Lewd Conduct Under Section 288*

Erazo next contends the prosecution erroneously "split [defendant's single, continuous act] into two separate charges, one greater and one lesser included, and obtained two separate convictions and sentences." The prosecutor argued Erazo committed a lewd act under section 288, subdivision (a), when he touched Emma's vagina outside her clothing, and committed a second offense, a forcible lewd act under section 288, subdivision (b), when he removed Emma's shorts and underwear, pinned her hands, got on top of her, and his penis touched her right hand. Erazo faults this approach "because [his] course of conduct is properly viewed as one forcible offense," therefore "two separate convictions . . . based on this single assault were precluded." We disagree.

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the court considered the problem of multiple lewd act convictions arising from a single occasion. There, the defendant had sexual intercourse with the victim, and also sexually fondled her breasts

[5] We disagree with Erazo that *Ortiz* error is "trial error" that affects the reliability of the guilt determination process.

and buttocks. He was convicted and sentenced under the lewd conduct statute (§ 288) for both the intercourse and the fondling.

Scott held the Court of Appeal erred in striking the lewd conduct conviction based on the fondling. The court rejected the defendant's argument fondling activities are necessarily indivisible from other sex crimes committed on the same occasion, holding *each distinct lewd act can result in a separate violation of section 288*. (See *People v. Harrison* (1989) 48 Cal.3d 321 [the defendant inserted his finger into victim's vagina three separate times because it repeatedly dislodged when she pulled away; the brief attack ended when the victim escaped after the last penetration; court upheld three convictions under section 289 for penetration by foreign object].) *Scott* noted that *Harrison* rejected a requirement the defendant must have had a reasonable opportunity to reflect between acts, and concluded "*[e]ach individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation*." (*Scott, supra,* 9 Cal.4th at pp. 346-347, italics added.)

Scott disapproved cases "disallow[ing] separate convictions for distinct fondling activities based on the assumption that they are generally 'incidental' and 'preparatory to' other sex crimes committed on the same occasion." (*Scott, supra,* 9 Cal.4th at p. 347.) *Scott* explained "this notion was extracted from older cases which addressed the separate problem of multiple *punishment* under section 654, and which are outdated even in that context." (*Ibid.*) *Scott* noted that opinions finding only a single offense despite evidence of multiple lewd acts relied on several cases, including *People v. Greer* (1947) 30 Cal.2d 589, 604 (*Greer*). *Scott* observed that "contrary to the approach followed in these older cases, courts no longer assume that fondling offenses are 'incidental' to other sex crimes within the meaning of section 654, or that they are

exempt from separate punishment. The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act. [Citations.] And, to the extent the older cases remedied a section 654 *sentencing* problem by setting aside the 'duplicative' *conviction*, that practice has been disavowed. [Citation.]" (*Scott*, *supra*, at p. 348, fn. 9, original italics.)

Here, Erazo committed two individual lewd acts. He first touched Emma's vagina over her clothing with his hand. After he removed her clothing by forcibly pinning her hands, he got on top of her, and his penis touched her hand, which was blocking her vagina. Under *Scott*, the prosecution could charge, and the jury was entitled to find, Erazo committed violations of section 288 based on each touching. In light of *Scott*, we reject Erazo's reliance on *Greer* and other cited cases following *Greer*'s rationale. (*Greer*, *supra*, 30 Cal.2d at pp. 600-601 [convictions for unlawful sexual intercourse with a minor and lewd and lascivious conduct with a minor barred by earlier conviction for lesser, necessarily included offense of contributing to the delinquency of a minor based on same acts].)

C. *Section 654 Did Not Bar Punishment for Both Lewd Conduct Convictions*

Finally, Erazo contends section 654 precluded multiple punishments for his "'single act or indivisible course of conduct.'" We do not find the contention persuasive.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 "applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Generally, whether a

course of conduct is a divisible transaction depends on the intent and objective of the actor: "If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

In sex crime cases however, section 654 is of limited utility to defendants who commit multiple sex crimes against a single victim on a single occasion. The Supreme Court determined an intent to obtain sexual gratification is too broad and amorphous to determine the applicability of section 654. "To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552 (*Perez*).) As the Supreme Court later observed in *Scott*, "[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed. [Citations.]" (*Scott, supra,* 9 Cal.4th at pp. 344, fn. 6, 347 [theory is "clever molester could violate his victim in numerous lewd ways, safe in the knowledge that he could not be convicted and punished for every act"]; *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006 [particularly with regard to underage victims, it is inconceivable the Legislature would have intended this result].)

As *Scott* noted, under section 654, courts do not assume fondling offenses are incidental to other sex crimes within the meaning of section 654, or exempt from separate punishment. "The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act." (*Scott, supra,* 9 Cal.4th at p. 348, fn. 9.) Thus, courts have upheld multiple

punishments for separate touchings occurring during a single incident. (*Perez, supra,* 23 Cal.3d at pp. 551, 549 [during a period of 45 minutes to an hour, defendant orally copulated victim, committed sodomy on her, forced her to orally copulate him twice, had vaginal intercourse with her twice, and forcibly inserted a metal tube into her rectum and vagina; separate punishment for each sex offense permissible]; *In re R.C.* (2011) 196 Cal.App.4th 741, 751 [defendant put penis inside victim's vagina and kissed her on the mouth; separate punishment permitted for each lewd touching]; *Alvarez, supra,* 178 Cal.App.4th at pp. 1006-1007 [kissing before penetration and fondling was a separate and distinct act designed to arouse defendant and warranted multiple punishments].)

Erazo's reliance on *People v. Cleveland* (2001) 87 Cal.App.4th 263 is misplaced. That case primarily involved application of the *Apprendi v. New Jersey* (2000) 530 U.S. 466 line of cases to section 654. On the merits, *Cleveland* determined sufficient evidence existed for the trial court to conclude the defendant harbored divisible intents in committing robbery and attempted murder. The case does not support Erazo's claim his sentence violated section 654.

III

DISPOSITION

The judgment is reversed with directions to conduct a hearing at which the court shall determine Erazo's May 12, 2011, request to discharge retained counsel in the light of the standard articulated in *Ortiz* and related cases. If the court determines Erazo was entitled to discharge counsel, the court shall set the case for retrial. If the court determines Erazo was not entitled to discharge counsel, the court shall reinstate the judgment.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.